

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GINNY L. MURPHY)	
Claimant)	
VS.)	
)	
SONIC DRIVE-IN OF GIRARD)	Docket No. 1,061,087
Respondent)	
AND)	
)	
ACCIDENT FUND INSURANCE COMPANY)	
OF AMERICA)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the October 4, 2012 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. William L. Phalen of Pittsburg, Kansas, appeared for claimant. Bill W. Richerson of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

Judge Avery ruled that claimant sustained a compensable injury at work and ordered respondent to provide medical treatment with Dr. Kim Burns, pay a \$242 medical bill, pay \$85.80 in medical mileage, and pay temporary total disability benefits at the rate of \$187.50 per week from May 18, 2012, until further order, claimant reaching maximum medical improvement or returning to substantial and gainful employment. Respondent requests review of Judge Avery's preliminary hearing Order.

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the September 28, 2012 preliminary hearing and exhibits thereto, in addition to all pleadings and documents contained in the administrative file.

ISSUE

Respondent asserts Judge Avery lacked jurisdiction to enter a preliminary hearing decision because the judge did not personally mail notice of the hearing to the parties.

Respondent contends:

Appellant was entitled by the statute to receive at least seven days' written notice by mail of the date set for the preliminary hearing **from the administrative law judge**. There is no dispute that the administrative law judge did not mail out notice of the preliminary hearing to the parties in this case. Accordingly, the administrative law judge had no jurisdiction to proceed with the preliminary hearing on September 28, 2012, or to issue his Order for Compensation because the mandatory notice requirement under K.S.A. 44-534a(1) was not met (bold in original).¹

Therefore, the issue² raised on review is:

1. Did Judge Avery exceed his jurisdiction by holding a preliminary hearing and granting benefits to claimant if he failed to follow the notice of hearing requirements set forth in K.S.A. 44-2011 Supp. 44-534a(a)(1).

Claimant asserts the Appeals Board lacks jurisdiction to hear respondent's appeal and, in the alternative, Judge Avery's preliminary hearing Order should be affirmed.

Respondent's request for oral arguments before the Appeals Board is denied.

FINDINGS OF FACT

Claimant filed an application for preliminary hearing on August 1, 2012. Claimant scheduled a preliminary hearing to occur on September 28, 2012 at 1:00 p.m. at the Crawford County Judicial Center, 602 N. Locust, Pittsburg, Kansas. Claimant's attorney mailed an August 6, 2012 letter to Judge Avery, with copies going to respondent and insurance carrier, confirming the time, date and place of the preliminary hearing.

Respondent's attorney's entry of appearance was dated August 31, 2012. The administrative file contains no indication that either the Division of Workers Compensation or the claimant's attorney advised respondent's attorney that a preliminary hearing would occur on September 28, 2012.

¹ Respondent's Brief at 5 (filed Nov. 9, 2012).

² Respondent also questioned in its application for review if claimant's application for preliminary hearing was improperly filed because it was not accompanied with: (a) a copy of the notice of intent, (b) certification that such notice was served on respondent, and (c) medical reports which claimant intended to produce as evidence. All such documents were attached to the August 1, 2012 application for preliminary hearing. Respondent's brief sets forth no arguments on this issue. A point incidentally raised, but not adequately argued, is abandoned. *Herrell v. Nat'l Beef Packing Co., LLC*, 292 Kan. 730, 736, 259 P.3d 663 (2011).

Respondent did not appear for the September 28, 2012 hearing. After waiting 50 minutes after the scheduled start of the preliminary hearing, Judge Avery allowed claimant to present testimony and exhibits. Judge Avery noted the August 6, 2012 letter confirming the date and time of the hearing was sent to respondent and insurance carrier. The record does not indicate if Judge Avery or claimant's attorney tried to contact respondent's attorney concerning his absence at the hearing.

Judge Avery's preliminary hearing Order was e-mailed to counsel at 11:48 a.m. on October 4, 2012. At 1:15 p.m., respondent's attorney e-mailed Judge Avery's assistant and claimant's attorney, stating he did not recall receiving notice of the preliminary hearing. Respondent's attorney specifically indicated in this e-mail that he was not accusing claimant's attorney of any improper conduct. The administrative file also contains an October 4, 2012 e-mail from respondent's attorney's paralegal showing that their file contained no mention that a preliminary hearing was scheduled for September 28, 2012.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-523(a) states: "The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality."

K.A.R. 51-3-5a(c) states: "In no case shall an application for preliminary hearing be entertained by the administrative law judge when written notice has not been given to the adverse party pursuant to K.S.A. 44-534a."

K.S.A. 2011 Supp. 44-534a(a) (1) states, in part,:

The director shall assign the application [for preliminary hearing] to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

Due process requires that notice be reasonably calculated to apprise the interested parties of the pendency of an action and afford the parties an opportunity to be heard and present objections.³ Due process requirements apply to an administrative body acting in a quasi-judicial capacity.⁴

³ *Johnson v. Brooks Plumbing, LLC*, 281 Kan. 1212, Syl. ¶ 4, 135 P.3d 1203 (2006); *Nguyen v. IBP, Inc.*, 266 Kan. 580, 585, 972 P.2d 747 (1999).

⁴ *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 784, 473 P.2d 72 (1970).

The Board's jurisdiction to review preliminary hearing is limited to: (1) did claimant suffer injury by accident or repetitive trauma; (2) did the injury arise out of and in the course of claimant's employment; (3) did claimant provide proper notice; and (4) do certain defenses apply.⁵ The Board also has jurisdiction to review preliminary hearing findings if it is alleged the administrative law judge exceeded his or her jurisdiction.⁶

ANALYSIS

Whether a party was given proper notice of the preliminary hearing is not a jurisdictional issue listed in K.S.A. 2011 Supp. 44-534a(a)(2). The Appeals Board only has jurisdiction to review this issue if Judge Avery exceeded his jurisdiction in granting claimant the requested preliminary hearing benefits.

K.S.A. 2011 Supp. 44-534a(a) states, "The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing." When notice of a preliminary hearing has not been given to respondent, the judge lacks authority to conduct the hearing and enter a preliminary award.⁷ Notice to respondent is satisfactory; separate notice need not be given to the insurance carrier.⁸

This Board Member disagrees with respondent's interpretation of K.S.A. 2011 Supp. 44-534a(a)(1) for four reasons.

First, while respondent sets forth a technical argument as to who must provide notice of a hearing, technical rules of procedure do not apply.⁹ Rather, the parties are allowed a reasonable opportunity to be heard and present evidence.¹⁰ K.S.A. 2011 Supp. 44-534a(a)(1), to a large degree, concerns procedural rules. The statute mandates that notice of a preliminary hearing be provided to the parties. Implicit in Judge Avery's decision to proceed with the hearing was his finding that sufficient notice was given to respondent. Indeed, the August 6, 2012 letter that claimant's attorney mailed to Judge Avery, respondent and insurance carrier gave sufficient notice that a preliminary hearing would occur on September 28, 2012. Respondent and insurance carrier had fair notice of

⁵ K.S.A. 2011 Supp. 44-534a(a)(2).

⁶ K.S.A. 2010 Supp. 44-551(i)(2)(A).

⁷ *England v. Most Health Care Systems, Inc.*, No. 1,049,168, 2010 WL 4449310 (Kan. WCAB Oct. 25, 2010); *Delgadillo v. Forrest Energy, LLC*, No. 1,036,705, 2008 WL 375822 (Kan. WCAB Jan. 15, 2008).

⁸ *Athey v. Davis Roofing*, No. 230,907, 1998 WL 304303 (Kan. WCAB May 29, 1998)

⁹ K.S.A. 2011 Supp. 44-523(a).

¹⁰ *Id.*

this preliminary hearing and a reasonable opportunity to appear and present evidence. For reasons not disclosed in the record, respondent and insurance carrier did not attend the preliminary hearing.

Second, even if the administrative law judge was literally required to provide notice of a preliminary hearing by mail, such objective was substantially accomplished by claimant's attorney's letter dated August 6, 2012. The doctrine of substantial compliance has been applied to workers compensation cases.¹¹ "Substantial compliance" generally means "compliance in respect to the essential matters necessary to assure every reasonable objective of the statute." [Citation omitted.]¹² One of the purposes of K.S.A. 2011 Supp. 44-534a(a)(1) is for the parties to have notice of a preliminary hearing. Claimant's attorney substantially complied with such statutory goal by providing written notice of the preliminary hearing to respondent and insurance carrier. There is no additional requirement that notice be provided to respondent's counsel.

Third, Judge Avery did not exceed his jurisdiction in entering the preliminary hearing Order. Judge Avery set the case for a preliminary hearing, as statutorily required. Judge Avery also satisfied the requirement that all parties had at least seven days' written notice by mail of the preliminary hearing. Claimant's attorney's August 6, 2012 letter provided over seven *weeks'* notice of the September 28, 2012 preliminary hearing. The fact that Judge Avery did not personally mail the notice, but instead relied on claimant's attorney's August 6, 2012 letter, is immaterial. The judge ensured that the parties had "at least seven days' written notice by mail . . . of the date set for such hearing."¹³ The statute does not require that the administrative law judge personally mail the required notice, only that the judge give at least seven days' mailed and written notice of the hearing.

Fourth, inasmuch as respondent and insurance carrier had notice of the preliminary hearing, it was their responsibility to appear or have an attorney present for the scheduled hearing to represent their interests. There is no argument that respondent and/or the insurance carrier did not have adequate notice of the preliminary hearing. Rather, the only argument hinges on a technicality that the hearing could not take place unless the judge personally mailed notice of the hearing to the parties. As noted above, no such responsibility existed. The judge only had to ensure that the parties had at least seven days' mailed and written notice of the preliminary hearing. It was not Judge Avery's responsibility to ensure that respondent have an attorney present at the preliminary hearing. Claimant's attorney's August 6, 2012 letter satisfied the statutory requirement of notice of hearing, along with any potential due process concerns.

¹¹ *Kelly v. Phillips Petroleum Co.*, 222 Kan. 347, 354-57, 566 P.2d 10 (1977).

¹² *Hernandez v. State*, No. 105,059, 260 P.3d 102 (Kansas Court of Appeals unpublished opinion filed Sep. 23, 2011) (quoting *City of Lenexa v. City of Olathe*, 233 Kan. 159, 164, 660 P.2d 1368 (1983)).

¹³ K.S.A. 44-534a(1).

CONCLUSION

Based on the record compiled to date and considering the parties' arguments, Judge Avery had jurisdiction to enter the preliminary hearing Order dated October 4, 2012. Insofar as Judge Avery did not exceed his jurisdiction, the Board lacks jurisdiction to review this matter. Given a lack of jurisdiction, the Board may only dismiss the action.¹⁴

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁶

WHEREFORE, the undersigned Board Member dismisses the respondent's appeal of the October 4, 2012 preliminary hearing Order entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of November, 2012.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
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Brad E. Avery, Administrative Law Judge

¹⁴ See *Phillips v. Liberty Homes, Inc.*, Docket No. 1,055,877, 2012 WL 4040465 (Kan. WCAB Aug. 17, 2012).

¹⁵ K.S.A. 2011 Supp. 44-534a.

¹⁶ K.S.A. 2011 Supp. 44-555c(k).